17

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1912.

No. [redacted]30.

WILLIAM G. HANNUM, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED APRIL 8, 1910.

(22,093.)

(22,093.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 249.

WILLIAM G. HANNUM, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 26, 1911.

1 In the Court of Claims.

No. 29833.

WILLIAM G. HANNUM
v.
THE UNITED STATES.

I. *Petition.*

Filed October 16, 1906.

To the honorable the Court of Claims:

The claimant respectfully represents:

The claimant entered the Naval service of the United States in the year 1872, and had, prior to the 23d day of October, 1900, attained the rank of lieutenant in the Navy. He was upon and prior to that date entitled by virtue of the 13th section of the Act of March 3, 1899, commonly known as the Navy Personnel Act, to receive the same pay as an officer of corresponding rank in the army, to-wit, a captain, not mounted, of more than twenty years' service in the army, which pay was, by section 1261 of the Revised Statutes, $1,800 a year; and by sections 1262 and 1263, a longevity increase thereon of $720, making a total rate of pay to which he was entitled to $2,520 a year.

On said 23d day of October, in the year 1900, he was retired by order of the President from active service in the Navy, and has ever since that date been carried on the Navy register as a lieutenant on the retired list. By virtue of such retirement from active service, he became entitled to the pay allowed to an officer of the army by the following provision of the Revised Statutes, made applicable to the Navy by section 13, of the Navy Personnel Act:

"SEC. 1274. Officers retired from active service shall receive seventy-five per centum of the pay of the rank upon which they are retired."

The rate of pay to which he thus became entitled is seventy-five per cent of his pay on the active list of $2,520, or $1,890 a year. Instead, however, of being paid at that rate, he has been paid since the date of his retirement at the rate of only $1,071 a year, making a difference of $819 a year between the rate of pay which he should have received and the rate of pay which he has received. Claimant is therefore entitled to a difference of $819 a year for the six years since his retirement amounting to $4,914, which amount he claims.

No assignment or transfer of this claim, or any part thereof or interest therein, has been made; and the claimant is justly entitled to the amount herein claimed from the United States, after allowing all just credits and off-sets. The claimant is a citizen of the United

States. And the claimant claims the sum of four thousand nine hundred and fourteen dollars ($4,914).

GEORGE A. & WM. B. KING,
Attorneys for Claimant.

STATE OF NEW YORK,
County of Delaware, ss:

William G. Hannum, being duly sworn, deposes and says: I am the claimant in this case. I have read the above petition, and the matters therein stated are true, to the best of my knowledge and belief.

W. G. HANNUM.

Subscribed and sworn to before me this 13th day of October, 1906.

[SEAL.] JOHN OLMSTEAD,
Notary Public.

2 II. *Traverse.*

(Filed March 18, 1908.)

In the Court of Claims of the United States, —— Term, A. D. 1908–1909.

No. 29833.

WILLIAM G. HANNUM
v.
THE UNITED STATES.

And now comes the Attorney-General, on behalf of the United States, and, answering the petition of the claimant herein, denies each and every allegation therein contained, and asks judgment that the petition be dismissed.

JOHN Q. THOMPSON,
Assistant Attorney-General.

3 III. *Argument and Submission.*

This cause was argued by Mr. George A. King for the claimant and by Mr. F. De C. Faust for the defendants, and submitted March 18, 1908, and afterwards, on motion for new trial or modification of findings, March 14, 1910.

4 IV. *Findings of Fact and Conclusion of Law and Opinion of the Court.*

(Filed March 30, 1908; as Modified, March 28, 1910.)

No. 29833.

WILLIAM G. HANNUM
v.
THE UNITED STATES.

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

Findings of Fact.

I.

The claimant herein, William G. Hannum, entered the naval service as a cadet midshipman on September 24, 1872, attained the rank of lieutenant October 2, 1891, and in October, 1900, held the rank of lieutenant in the United States Navy.

II.

On October 22, 1900, claimant, upon a report of a retiring board, was placed on the retired list of the Navy as incapacitated for active service not a result of an incident of the service. Said report was approved and the claimant retired by order of the President as follows:

EXECUTIVE MANSION, *October* 22, 1900.

The proceedings and findings of the board in this case are approved, and Lieut. William G. Hannum, U. S. Navy, will be retired from active service and placed on the retired list on furlough pay, in conformity with the provisions of section 1454 of the Revised Statutes.

WILLIAM McKINLEY.

III.

Since his retirement as aforesaid, claimant has been paid at the rate of $1,071 a year, the same being one-half of the pay he would have received had he been on shore duty on the active list, except for a period from October 22, 1903, to May 6, 1904, when he was on active duty, under the act of June 7, 1900 (31 Stat. L., 703), and received $2,142 a year.

IV.

Had claimant been paid 75 per cent of the pay of the rank upon which he was retired, as provided by section 1274 of the Revised Statutes, he would have received $1,890 a year instead of $1,071 a

year, making a difference of $819 a year, which up to October 21, 1903, a period of two years, eleven months, and twenty-seven days, would have amounted to the additional sum of $2,450.17.

Had he been entitled under the next to the last proviso of section 13 of the personnel act (30 Stat. L., 1007), as amended by the act of June 7, 1900 (31 Stat. L., 697), to receive when on active duty the pay provided by Revised Statutes, section 1556, for lieutenants after five years from date of commission on shore duty, he would be entitled to $2,200 a year instead of $2,142 a year, making a difference of $58 a year. Therefore he would have received for the period while he was on active duty the additional sum of $31.42.

Had he been paid from May 7, 1904, to December 31, 1906, at the rate of $1,890 a year instead of $1,071 a year, a period of two years seven months and twenty-four days, he would have received the additional sum of $2,170.25, making in all the sum of $4,651.84.

Conclusion of Law.

Upon the foregoing findings of fact the court decides as a conclusion of law that judgment be entered for the claimant for $31.42, and as to all other items the petition be, and the same is hereby, dismissed.

Opinion.

ATKINSON, *J.*, delivered the opinion of the court.

The claimant entered the naval service as a cadet midshipman September 24, 1872, and attained the rank of lieutenant in the United States Navy October 2, 1891. October 23, 1900, he was, by order of the President, transferred to the retired list of officers of the Navy upon the decision of a retiring board in conformity with the provisions of section 1454 of the Revised Statutes, and has since that date been enrolled on the Navy Register as a lieutenant on the retired list. He has since his retirement been paid, when not on active duty, at the rate of $1,071 per year, that being one-half of the pay to which he would have been entitled if on shore duty on the active list.

When on active duty, he was paid at the rate of $2,142 a year, this being the rate of pay under Revised Statutes, sections 1261 and 1262, of a captain in the army (corresponding to a lieutenant in the navy) of more than twenty years' service, with a reduction of 15 per cent for shore duty under the navy personnel act.

In accordance with the findings of the retiring board the President on October 22, 1900, as stated above, retired the claimant from active service and placed him on the retired list on furlough pay, which, under section 1593 of the Revised Statutes, is one-half of the pay to which he would have been entitled if on leave of absence on the active list. That is to say, at the time the claimant was retired he was receiving, under section 13 of the act of March 3, 1899 (30 Stat. L., 1007), $2,142, one-half of which is $1,071, which amount he has since been paid.

He now contends that under said section 13 of the navy personnel act, supra, he is entitled upon retirement to the same pay as officers of the army of corresponding rank likewise retired under Revised Statutes, sections 1252 and 1274, which is "seventy-five per centum of the pay of the rank upon which they are retired."

Section 13 of the navy personnel act, so far as material here, provides:

"That, after June thirtieth, eighteen hundred and ninety-nine, commissioned officers of the line of the Navy and of the Medical and Pay Corps shall receive the same pay and allowances, except forage, as are or may be provided by or in pursuance of law for the officers of corresponding rank in the army: Provided, That such officers when on shore shall receive the allowances but fifteen per centum less pay than when on sea duty."

This section has been the subject of frequent interpretation both by the Supreme Court and by this court, and we think it is now fairly well settled that the general pay of officers of the navy on the active list is the same as that of officers of the army of corresponding rank. (The United States v. Thomas, 195 U. S. R., 418, 420.)

The title indicates the purpose of the act as well as the language quoted, and, when considered in connection with the provisos to the section, evidently means commissioned officers on the active list.

While the pay of naval officers on the active list is fixed by said section, no provision is therein made for their pay on the retired list. Such pay is regulated by the retirement sections of the statute, to which reference has been made.

The last proviso in express terms says: "That nothing in this act shall operate to increase or reduce the pay of any officer now on the retired list of the navy." This shows, we think, that Congress did not intend by the act to repeal or modify the law as it existed relating to the pay of naval officers on the retired list, present or future.

By sections 8 and 9 of said act provision is made for both voluntary and involuntary retirement "with the rank and three-fourths the sea pay of the next higher grade;" while by section 11 it will be noted that to entitle an officer of the navy who served during the civil war to retirement with the rank and three-fourths the sea pay of the next higher grade he must have a "creditable record."

6 We must therefore conclude that had Congress intended by their legislation to increase the pay of officers of the navy on the retired list who were retired because of their own misconduct, as provided by said section 1454, they would have said so; and as the last proviso to said act expressly excluded officers on the retired list at the time the act was passed from the operation thereof, we can see no reason why officers since the passage of the act by reason of their own misconduct, as in the case at bar, should not receive the pay provided for by section 1593, and especially as such has been the ruling of the executive departments having to do with such retirements since the act was passed.

For the reasons given we must hold that the claimant is not entitled to recover except as to the $31.42 for which judgment is awarded, and his petition is otherwise dismissed.

Howry, J., was not present and took no part in the disposition of this case.

7 V. *Judgment of the Court.*

No. 29833.

WILLIAM G. HANNUM
v.
THE UNITED STATES.

At a Court of Claims, held in the City of Washington on the 28th day of March, 1910, judgment was ordered to be entered as follows:

"The Court, on due consideration of the premises, find for the claimant and do order, adjudge and decree that William G. Hannum, the claimant, do have and recover of and from the United States the sum of thirty-one dollars and forty-two cents ($31.42)."

BY THE COURT.

8 VI. *Application for Appeal.*

In the Court of Claims.

No. 29833.

WILLIAM G. HANNUM
v.
THE UNITED STATES.

From the judgment rendered in the above-entitled cause on the 28th day of March, 1910, the claimant, William G. Hannum, by his attorneys of record, hereby makes application for and gives notice of an appeal to the Supreme Court of the United States.

KING & KING,
Attorneys for Claimant.

Filed in open Court April 4, 1910.

And now, to wit, April 4, 1910, it is ordered that the appeal be allowed as prayed.

BY THE COURT.

9 In the Court of Claims.

No. 29833.

WILLIAM G. HANNUM
vs.
THE UNITED STATES.

I, John Randolph certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact

and conclusion of law and opinion filed by the Court—of the judgment of the Court—of the application for and allowance of appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the Seal of the Court of Claims this 7 day of April 1910.

[Seal Court of Claims.]

JOHN RANDOLPH,
Ass't Clerk Court of Claims.

Endorsed on cover: File No. 22,093. Court of Claims. Term No. 249. William G. Hannum, appellant, vs. The United States. Filed April 8th, 1910. File No. 22,093.

Supreme Court of the United States

OCTOBER TERM, 19[illegible]

No. [illegible]

WILLIAM S. BARTON, APPELLANT

v.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

BRIEF FOR APPELLANT

[illegible]

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Supreme Court of the United States.

October Term, 1911.

WILLIAM G. HANNUM, *Appellant*,
v.
THE UNITED STATES.
} No. 249.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLANT.

I. Statement of the Case.

A. Findings of Fact.

The following are the facts found by the Court of Claims (Record, pp. 3, 4):

I. The claimant herein, William G. Hannum, entered the naval service as a cadet midshipman on September 24, 1872, attained the rank of lieutenant October 2, 1891, and in October, 1900, held the rank of lieutenant in the United States Navy.

II. On October 22, 1900, claimant, upon a report of a retiring board, was placed on the retired list of the Navy as incapacitated for active service not a result of an incident of the service. Said report was approved and the claimant retired by order of the President as follows:

Executive Mansion, October 22, 1900.

The proceedings and findings of the board in this case are approved, and Lieut. William G. Hannum, U. S. Navy, will be retired from active service and placed on

the retired list on furlough pay, in conformity with the provisions of section 1454 of the Revised Statutes.

WILLIAM MCKINLEY.

III. Since his retirement as aforesaid, claimant has been paid at the rate of $1,071 a year, the same being one-half of the pay he would have received had he been on shore duty on the active list, except for a period from October 22, 1903, to May 6, 1904, when he was on active duty, under the act of June 7, 1900 (31 Stat. L., 703), and received $2,142 a year.

IV. Had claimant been paid 75 per cent of the pay of the rank upon which he was retired, as provided by section 1274 of the Revised Statutes, he would have received $1,890 a year instead of $1,071 a year, making a difference of $819 a year, which up to October 21, 1903, a period of two years, eleven months, and twenty-seven days, would have amounted to the additional sum of $2,450.17.

Had he been entitled under the next to the last proviso of section 13 of the personnel act (30 Stat. L., 1007), as amended by the act of June 7, 1900 (31 Stat. L., 697), to receive when on active duty the pay provided by Revised Statutes, section 1556, for lieutenants after five years from date of commission on shore duty, he would be entitled to $2,200 a year instead of $2,142 a year, making a difference of $58 a year. Therefore he would have received for the period while he was on active duty the additional sum of $31.42.

Had he been paid from May 7, 1904, to December 31, 1906, at the rate of $1,890 a year instead of $1,071 a year, a period of two years seven months and twenty-four days, he would have received the additional sum of $2,170.25, making in all the sum of $4,651.84.

B. Statutes of Possible Application.

These may be classified as:

1. Army Statutes, that is, provisions of the Revised Statutes relating to the Army;

2. Navy Statutes, that is, provisions of the Revised Statutes relative to the Navy; and

3. The Navy Personnel Act of March 3, 1899, assimilating the pay of officers of the Navy to that of officers of the Army.

We give all statutes that may seem to have any possible application to this case.

1. Army Statutes.

Revised Statutes,

Title XIV: The Army.

Sec. 1245. When any officer has become incapable of performing the duties of his office, he shall be either retired from active service, or wholly retired from the service, by the President as hereinafter provided.

Sec. 1246. The Secretary of War, under the direction of the President, shall, from time to time, assemble an Army retiring board, consisting of not more than nine nor less than five officers, two-fifths of whom shall be selected from the Medical Corps. The board, excepting the officers selected from the Medical Corps, shall be composed, as far as may be, of seniors in rank to the officer whose disability is inquired of.

Sec. 1247. The members of said board shall be sworn in every case to discharge their duties honestly and impartially.

Sec. 1248. A retiring board may inquire into and determine the facts touching the nature and occasion of the disability of any officer who appears to be incapable of performing the duties of his office, and shall have such powers of a court-martial and of a court of inquiry as may be necessary for that purpose.

Sec. 1249. When the board finds an officer incapacitated for active service, it shall also find and report the cause which, in its judgment, has produced his incapacity, and whether such cause is an incident of service.

Sec. 1250. The proceedings and decision of the board shall be transmitted to the Secretary of War, and shall be

laid by him before the President for his approval or disapproval and orders in the case.

SEC. 1251. When a retiring board finds that an officer is incapacitated for active service, and that his incapacity is the result of an incident of service, and such decision is approved by the President, said officer shall be retired from active service and placed on the list of retired officers.

SEC. 1252. When the board finds that an officer is incapacitated for active service, and that his incapacity is not the result of any incident of service, and its decision is approved by the President, the officer shall be retired from active service, or wholly retired from the service, as the President may determine. The names of officers wholly retired from the service shall be omitted from the Army Register.

SEC. 1261. The officers of the Army shall be entitled to the pay herein stated after their respective designations: * * * Captain, not mounted: $1800 a year. * * *

SEC. 1262. There shall be allowed and paid to each commissioned officer below the rank of brigadier-general, including chaplains and others having assimilated rank or pay, ten per centum of their current yearly pay for each term of five years of service. (Amended June 30, 1882, 22 Stat. L. 118, to provide that the increase "shall be computed on the yearly pay of the grade").

SEC. 1263. The total amount of such increase for length of service shall in no case exceed forty per centum on the yearly pay of the grade as provided by law.

SEC. 1265. Officers when absent on account of sickness or wounds, or lawfully absent from duty and waiting orders, shall receive full pay; when absent with leave, for other causes, full pay during such absence not exceeding in the aggregate thirty days in one year, and half-pay during such absence exceeding thirty days in one year. When absent without leave, they shall forfeit all pay during such absence, unless the absence is excused as unavoidable.

SEC. 1274. Officers retired from active service shall receive seventy-five per centum of the pay of the rank upon which they are retired.

2. Navy Statutes.

Revised Statutes,
Title XV: The Navy.

Sec. 1448. Whenever any officer, on being ordered to perform the duties appropriate to his commission, reports himself unable to comply with such order, or whenever, in the judgment of the President, an officer is incapacitated to perform the duties of his office, the President, at his discretion, may direct the Secretary of the Navy to refer the case of such officer to a board of not more than nine or less than five commissioned officers, two-fifths of whom shall be members of the Medical Corps of the Navy. Said board, except the officers taken from the Medical Corps, shall be composed, as far as may be, of seniors in rank to the officer whose disability is inquired of.

Sec. 1449. Said retiring board shall be authorized to inquire into and determine the facts touching the nature and occasion of the disability of any such officer, and shall have such powers of a court-martial and of a court of inquiry as may be necessary.

Sec. 1450. The members of said board shall be sworn in each case to discharge their duties honestly and impartially.

Sec. 1451. When said retiring board finds an officer incapacitated for active service, it shall also find and report the cause, which, in its judgment, produced his incapacity, and whether such cause is an incident of the service.

Sec. 1452. A record of the proceedings and decision of the board in each case shall be transmitted to the Secretary of the Navy, and shall be laid by him before the President for his approval or disapproval, or orders in the case.

Sec. 1453. When a retiring board finds that an officer is incapacitated for active service, and that his incapacity is the result of an incident of the service, such officer shall, if said decision is approved by the President, be retired from active service with retired pay, as allowed by Chapter Eight of this Title.

Sec. 1454. When said board finds that an officer is incapacitated for active service and that his incapacity is

not the result of any incident of the service, such officer shall, if said decision is approved by the President, be retired from active service on furlough pay, or wholly retired from service with one year's pay as the President may determine.

SEC. 1457. Officers retired from active service shall be placed on the retired list of officers of the grades to which they belonged respectively at the time of their retirement, and continue to be borne on the Navy Register. They shall be entitled to wear the uniform of their respective grades, and shall be subject to the rules and articles for the government of the Navy and to trial by general court-martial. The names of officers wholly retired from the service shall be omitted from the Navy Register.

SEC. 1466. The relative rank between officers of the Navy, whether on the active or retired list, and officers of the Army, shall be as follows, lineal rank only being considered: * * *

Lieutenants with captains. * * *

SEC. 1556. The commissioned officers and warrant officers on the active list of the Navy of the United States, and the petty officers, seamen, ordinary seamen, firemen, coal-heavers, and employés in the Navy, shall be entitled to receive annual pay at the rates herein stated after their respective designations: * * *

Lieutenants, during the first five years after date of commission, when at sea, $2400; on shore duty, $2000; on leave, or waiting orders, $1600; after five years from such date, when at sea, $2600; on shore duty, $2200; on leave, or waiting orders, $1800. * * *

SEC. 1588. The pay of all officers of the Navy who have been retired after forty-five years' service after reaching the age of sixteen years, or who have been or may be retired after forty years' service, upon their own application to the President, or on attaining the age of sixty-two years, or on account of incapacity resulting from long and faithful service, from wounds or injuries received in the line of duty, or from sickness or exposure therein, shall, when not on active duty, be equal to seventy-five per centum of the sea-pay provided by this chapter for the grade or rank which they held, respectively, at the time

of their retirement. The pay of all other officers on the retired list shall, when not on active duty, be equal to one-half the sea-pay provided by this chapter for the grade or rank held by them, respectively, at the time of their retirement.

SEC. 1593. Officers placed on the retired list, on furlough pay, shall receive only one-half of the pay to which they would have been entitled if on leave of absence on the active list.

3. NAVY PERSONNEL ACT, MARCH 3, 1899 (30 STAT. L. 1004).

An Act To reorganize and increase the efficiency of the personnel of the Navy and Marine Corps of the United States. (Provisos paragraphed and numbered for convenience.)

SEC. 13. That, after June 30th, 1899, commissioned officers of the line of the Navy and of the Medical and Pay Corps shall receive the same pay and allowances, except forage, as are or may be provided by or in pursuance of law, for the officers of corresponding rank in the Army:

(1) **Provided*, That such officers when on shore shall receive the allowances, but fifteen per centum less pay than when on sea duty; but this provision shall not apply to warrant officers commissioned under section twelve of this Act:

(2) *Provided further*, That when naval officers are detailed for shore duty beyond seas they shall receive the same pay and allowances as are or may be provided by or in pursuance of law for officers of the Army detailed for duty in similar places:

(3) *Provided further*, That naval chaplains, who do not possess relative rank, shall have the rank of lieutenant in the Navy; and that all officers, including warrant officers, who have been or may be appointed to the Navy from civil life shall, on the date of appointment, be credited, for computing their pay, with five years' service.

* This proviso was repealed June 29, 1906 (34 Stat. L. 554).

And all provisions of law authorizing the distribution among captors of the whole or any portion of the proceeds of vessels, or any property hereafter captured, condemned as prize, or providing for the payment of bounty for the sinking or destruction of vessels of the enemy hereafter occurring in time of war, are hereby repealed:

(4) **And provided further*, That no provision of this Act shall operate to reduce the present pay of any commissioned officer now in the Navy; and in any case in which the pay of such an officer would otherwise be reduced he shall continue to receive pay according to existing law:

(5) *And provided further*, That nothing in this Act shall operate to increase or reduce the pay of any officer now on the retired list of the Navy.

SEC. 26. That all acts and parts of acts, so far as they conflict with the provisions of this Act, are hereby repealed.

Approved, March 3, 1899.

C. The Issue and Decision Thereon.

The question is: Is an officer of the Navy retired from active service in pursuance of the finding of a Retiring Board that he is incapacitated for active service, and that his incapacity is not the result of an incident of the service in pursuance of Revised Statutes, Sec. 1454 (*ante*, pp. 5, 6), restricted to "furlough pay" as provided by that section and defined by Sec. 1593 (*ante*, p. 7)? Or is he, by virtue of the assimilating provision of Sec. 13 of the Navy Personnel Act (*ante*, p. 7), entitled to receive seventy-five per cent of the pay of the rank upon which he is retired, as would be the case with an army officer

* This proviso was, June 7, 1900, "hereby so amended as to provide that nothing therein contained shall operate to reduce the pay which, but for the passage of said Act, would have been received by any commissioned officer at the time of its passage or thereafter" (31 Stat. L. 697).

retired under similar circumstances as provided by Rev. Stat. Secs. 1252 and 1274 (*ante*, p. 4)?

The Court of Claims decided (opinion, record, pp. 4, 5) that the officer was entitled to only "furlough pay" as defined by Rev. Stat. Sec. 1593 (*ante*, p. 7). Such pay the court ascertained by taking the pay to which the officer would be entitled at Army rates, while on active duty at the date of his retirement, deducting therefrom fifteen per cent, as provided by the first proviso of Sec. 13 of the Personnel Act (*ante*, p. 7) for "such officers when on shore," and allowing the officer one-half of that rate.

As this is the rate at which he had been paid in pursuance of decisions of the accounting officers, the court held he was entitled to no more and dismissed his petition, except as to the small item for about six months while on active duty after retirement, as to which the old Navy rate of pay was slightly in excess of the Army pay computed under the Personnel Act, and to which the officer was therefore entitled under proviso (4) of Sec. 13 as amended by the Act of 1900 (*ante*, p. 8). Judgment was rendered for this amount, $31.42, and as to the remainder of the claim the petition was dismissed (record, p. 6). From this judgment the claimant appealed to this court.

II. Assignment of Error.

The appellant hereby assigns the following errors in the judgment of the Court of Claims:

1. That said court held and decided that the appellant as an officer of the Navy retired from active service after the date of the passage of the Navy Personnel Act of March 3, 1899 (*ante*, p. 7), was not entitled to the pay to which an army officer would be entitled under similar circumstances, but was limited to the rate of pay

provided by Sec. 1593 of the Revised Statutes (*ante*, p. 7); whereas, said court should have held and decided that the appellant was entitled to the same pay to which an officer of the Army retired under similar circumstances would be entitled under Rev. Stat. Secs. 1252 and 1274 (*ante*, p. 4), to-wit: seventy-five per cent of the pay of the rank upon which he was retired.

2. That said court failed to give the appellant the benefit of the repeal of the proviso (1) "That such officers when on shore shall receive the allowances, but fifteen per centum less pay than when on sea duty" (*ante*, p. 7), which proviso was repealed June 29, 1906 (34 Stat. 554), and limited him to the receipt of one-half his pay at Army rates, diminished by fifteen per cent while on shore duty, even for the time subsequent to June 29, 1906, the date of repeal of the proviso so reducing the pay.

III. Brief of Argument.

Application of Army Statute.

While a number of statutes are given above as having some possible bearing on the case, the real issue is simpler than might at first appear.

Prior to the passage of the personnel act of March 3, 1899, the law provided for retiring boards in the case of officers both of the Army and of the Navy. The proceedings were the same. In either service the officer was, where the incapacity was not the result of an incident of the service, either to be retired from active service, or wholly retired from the service. The only difference was in the matter of pay. The army officer, when retired for such incapacity, was, upon retirement, to receive, as in all other cases of retirement, seventy-five per cent (75%) of his pay on the active list. The naval officer was to receive one-half the pay to which he would have been entitled if on leave of absence on the active list.

The Navy Personnel Act says that officers of the Navy "shall receive the same pay and allowances" as "the officers of corresponding rank in the Army." The Army statute gives to officers retired from active service seventy-five per cent of the pay of the rank upon which they are retired in all cases irrespective of the cause of retirement. The naval officer is, therefore, now clearly entitled to the Army retired pay when retired for any cause whatever.

Army Pay Provisions Applicable to Navy.

The change made by the Navy Personnel Act is a sweeping one, and of its own force sets aside all previous provisions of law for Navy pay and places officers of the Navy upon the same pay to which officers of the Army would, under like circumstances, be entitled.

The organization and duties of the commissioned personnel of the Navy differ, in many particulars, from those of the corresponding personnel of the Army. This difference is inherent in the different character of the two services, and is not removed by the Personnel Act. The 13th Section of the Personnel Act is designed to remove, and if properly enforced, does remove, all differences in the matter of pay. Wherever an officer of the Army becomes, under any given circumstances, entitled to pay at a certain rate, there the officer of the Navy, under analogous circumstances, becomes entitled to the same pay. The only difficulty which can arise in applying provisions of law fixing the pay of officers of the Army to the pay of officers of the Navy, is in deciding whether the circumstances are analogous. No such difficulty can arise in the present case.

We have set forth above (pp. 5, 6) the provisions of the Revised Statutes in relation to retiring boards in the Navy, the effect of their action, and the result in case they find the

officer incapacitated from some cause which is an incident of the service, and, on the other hand, the effect in case the cause is decided to be one not incident to the service, and finally, the pay which the officer is to receive when placed on the retired list by virtue of the report of the retiring board when approved by the President.

We have also given (*ante*, pp. 3, 4) the corresponding provisions in relation to the retirement of officers of the Army and the pay of such officers when so placed upon the retired list.

So far as these provisions relate to the composition of retiring boards, their proceedings, the treatment of an officer when his incapacity is found to result from an incident of the service, and, on the other hand, when it is found to result from a cause not incident to the service, everything is strikingly alike.

The only difference between the two is in the pay of the officer after being placed upon the retired list. The officer of the Navy placed upon the retired list was to get full retired pay, that is, seventy-five per cent of his pay on the active list if retired from a cause incident to the service. He was to get only furlough pay, defined as one-half of leave-of-absence pay, if retired from some cause not incident to the service. On the other hand, the army officer retired, no matter from what cause, was in all cases to receive seventy-five per cent of the pay of his rank on the active list.

So stood the law at the date of the passage of the Personnel Act. The retirement laws already in force were just alike for the Army and for the Navy with the exception of this difference of pay. The Personnel Act, at one stroke of the pen, abolished the difference in pay between the Army and the Navy, and placed the officers of the Navy upon Army pay. Thus the only difference in pay between the officer of the Army and the officer of the Navy retired upon the report of a retiring board was done away with.

The officer of the Army has always been entitled, when retired for whatever cause, to seventy-five per cent of his pay upon the active list. The officer of the Navy, by virtue of the Personnel Act, becomes entitled to the benefit of the same provision. Any different rule is in violation of the clear provision of the 13th section of the Personnel Act.

Retired Officers' Pay Assimilated.

The Court of Claims puts its decision adverse to this claim upon the ground that it is only the pay of officers on the active list of the Navy that is assimilated to that of officers of the Army, and that officers on the retired list are not affected. This holding is at war with the uniform current of decision in this court as well as the Court of Claims and with the practice of the executive departments under this very act.

In *United States* v. *Tyler*, 105 U. S. 244, the question was whether an officer of the Army on the retired list was within the term "each commissioned officer" used in Rev. Stat. Sec. 1262 (*ante*, p. 4). This is the same question as is here involved in regard to an officer of the Navy. The court held that he was within this term, saying (p. 246):

"It is impossible to hold that men who are by statute declared to be a part of the army, who may wear its uniform, whose name shall be borne upon its register, who may be assigned by their superior officers to specified duties by detail as other officers are, who are subject to the rules and articles of war, and may be tried, not by a jury, as other citizens are, but by a military court-martial, for any breach of those rules, and who may finally be dismissed on such trial from the service in disgrace, are still *not* in the military service.

"If Congress chose to provide for their qualified relief from active duty, and for a diminished compensation, it

did not discharge them from their other obligations as part of the army of the United States. And if, because they were not required to do full service thereafter, their compensation was diminished by the statute twenty-five per cent, that is no reason why the accounting officers should add a further limitation of pay not found in any statute.

"We are of opinion that retired officers are in the military service of the government, and that the increased pay of ten per cent for each five years' service applies to the years so passed in the service after retirement as well as before."

Accordingly, the Court of Claims has held that retired officers of the Army are within the statutory prohibition against persons holding office under the Government acting as attorneys in the prosecution of claims against the United States. One of the cases was that of the very officer (Tyler) in whose case this court rendered the decision above quoted (In re *Tyler*, 18 C. Cls. 25; in re *Winthrop*, 31 C. Cls. 35).

So too, a retired naval officer is within a statute relating to "salaried officers" (*Franklin* v. *United States*, 29 C. Cls. 6).

Proviso as to Retired Pay.

The concluding proviso (5) to Section 13 of the Navy Personnel Act (*ante*, p. 8) reads as follows:

"That nothing in this Act shall operate to increase or reduce the pay of any officer *now* on the retired list of the Navy."

This plainly indicates the intent of Congress—that officers retired afterwards should be paid according to the new pay table. As a matter of fact, they always have been so paid, outside of this and a few other exceptional cases.

The pay which an officer has, prior to the date of his

retirement, been receiving on the active list, is always taken as the starting point toward calculating his pay after his retirement. It was so taken in this case. The annual pay being thus that which is fixed by an Army statute, we must necessarily take the percentage fixed by the Army statute (Revised Statutes, Sec. 1274, *ante*, p. 4) as the percentage to be given such officers as their pay after retirement. To hark back to the old pay statutes in force before the passage of the Personnel Act to ascertain what percentage of his active pay the retired officer is to receive, is an incongruity, and is contrary to the terms of the Personnel Act. Clearly that Act can only be carried out by regarding the Army pay provisions as adopted, not only for the purpose of ascertaining the active pay with which we are to start, but also the percentage of that pay which an officer is to be entitled to receive after retirement from active service. The construction placed by the Court of Claims upon this proviso (record middle p. 5) ignores the word "now" in the proviso. "Now means *at the present time.*" (*Nutt* v. *United States*, 26 C. Cls. 15, 17.)

Construction of Law by Navy Department.

It is said by the Court of Claims in the conclusion of the opinion, near foot p. 5:

"* * * especially as such has been the ruling of the executive departments having to do with such retirements since the act was passed."

We think this statement is founded in error. Certainly the act was not so understood by the Navy Department at the time of its passage nor has it been since.

Shortly after the passage of the Navy Personnel Act, the Navy Department promulgated certain "Navy and

Marine Corps Pay Tables" which constituted the authoritative manual for pay officers and have also been regularly printed semi-annually or annually as an appendix to the Official Register of the Navy.

Table 2 is entitled "Active List: Officers of the Line, Medical and Pay Corps of the Navy, and officers of the Marine Corps." One of the "remarks" to this table reads as follows:

"4. Officers of the line, Medical and Pay Corps of the Navy retired prior to the passage of the act approved March 3, 1899, continue to receive the same pay on the retired list that they received before the passage of said act. Those retired subsequently receive 75 per centum of pay (salary and increase) of their rank." Navy Pay Tables, 1899, p. 7; Navy Register, 1907, p. 232.

Table 3 of these tables gives the pay of officers of the Navy other than those of the line and medical and pay corps. These officers continued to be paid according to the old navy pay tables, not being affected by section 13 of the Personnel Act providing for army pay. Among the "remarks" to this table is the following:

"2. Officers on the retired list receive (according to the way in which they are retired) either three-fourths or one-half of the sea pay of their grade on the active list or one-half of their leave pay on the active list—furlough pay." Navy Pay Tables, 1899, p. 9; Navy Register, 1907, p. 235.

Here, the distinction is clearly drawn. Officers of the Navy still paid at old navy rates receive three-fourths or one-half pay, according to the mode in which they are retired. Officers of the line and of the medical and pay corps receive 75 per cent of the pay of their rank in all cases, irrespective of the cause of retirement.

Construction of Law by Treasury Department.

The decisions of the Treasury hold that the Act governs retired pay.

In a decision dated May 12, 1899, 5 Comp. Dec. 809, the Comptroller said, page 811:

"It would follow from the principle of these decisions that, as section 13 of the Navy Personnel Act provides for army pay to all commissioned officers of the line and Medical and Pay Corps, officers retired on army pay under the Act are entitled to longevity pay as retired officers in the same manner as retired army officers, and I so decide.

"This view is consistent with the proviso in said section that nothing in the Act should operate to increase or reduce the pay of any officer *now* on the retired list of the navy. The Act of August 5, 1882, so far as it relates to officers retired under the new law on army pay, is virtually superseded by the new Act."

Again, in a decision of January 6, 1900, 6 Comp. Dec. 585:

"The general provisions of section 13, however, which place the officers of the line and of the Medical and Pay Corps of the navy upon the same footing as to pay (with certain exceptions) as officers of corresponding rank in the army, operated to give to officers of the navy retired after the Act went into effect the same benefits of increasing pay for length of service, counting time spent as retired officers, as enjoyed by officers corresponding with them in rank in the army (5 Comp. Dec., 809); and but for the above proviso such increase would have been extended as well to officers retired before as after the passage of the Act, and the new law would have given them army retired pay instead of navy retired pay."

Speaking of this same Personnel Act, the Comptroller says in a decision dated March 20, 1907 (13 Comp. Dec. 630, 631):

"Officers on the retired list could at that time be ordered to active duty during war to serve with officers of the active list. It would, therefore, seem that any change to promote the efficiency of the personnel might reasonably be considered as including the retired list."

Other decisions of the Comptroller showing the application of the Personnel Act to retired officers will be found, 6 Comp. Dec. 669; 9 Comp. Dec. 681.

The Navy pay tables to which we have referred show that the computation of pay of retired officers has always been governed under the Personnel Act by their pay at Army rates as required by that Act, and not by the old Navy pay table contained in the Revised Statutes, Sec. 1556 (quoted in part, *ante*, p. 6).

Construction by Department of Justice.

While there has been no construction of the Personnel Act as regards this question by the Department of Justice, there has been a construction of Rev. Stat. § 1612 assimilating the pay of officers of the Marine Corps to that of the Army.

A quite analogous question was presented to the Attorney-General in 1878 in the case of Lieutenant George M. Welles of the Marine Corps. This officer was found by a retiring board to be incapacitated for active service from a cause not an incident of the service. The President indorsed his approval upon the record of the proceedings and findings of the board, adding, "Let him be retired on furlough pay." This action was taken under the impression that this same act allowing only furlough pay in certain cases to officers of the Navy applied to the Marine Corps. The provision of section 1612 of the Revised Statutes assimilating the pay of the Marine Corps to that of the Army was overlooked. The Attor-

ney-General says, after quoting section 1274 of the Revised Statutes (15 Opinions of Attorneys-General, 442, 444, 445):

"Thus, for officers of the Marine Corps who are retired from active service, as for officers of the Army who are so retired, there is but one rate of pay established by law, namely, 75 per centum of the pay of the rank upon which they are retired; and, I hardly need add, it is not competent to the President to place these retired officers on a different rate of pay than that which the law has fixed.

"The inquiry now arises, whether the action of the President in the present case amounts to an approval of the findings of the board and to a retirement of Lieutenant Welles from active service. If so, that officer was retired agreeably to the provisions of law regulating the retirement of officers of the Marine Corps, and is entitled to receive pay according to the rate established by law for retired officers of the Marine Corps, notwithstanding a different rate of pay was named by the President in retiring him.

"The first sentence of the indorsement of the President upon the record of the proceedings of the board admits of no other construction than that it was meant to express his approval of the finding of the board. Having thus approved the finding of the board, it rested entirely in his discretion whether Lieutenant Welles should be retired from active service or be wholly retired from the service; but it was necessary that one or the other be done, as the law is imperative that, when the decision of the board is approved by the President, the officer 'shall be retired,' &c. The direction given in the last sentence of the indorsement clearly indicates that it was the determination of the President that Lieutenant Welles be retired from active service simply. The compensation of an officer thus retired being fixed by statute, and not left to be determined by the President, in so far as that direction limits the pay of Lieutenant Welles on the retired list it must be treated as of no effect.

"It may well be that the indorsement was prepared inadvertently; it being supposed that the law which applies

to officers of the Navy (who may be retired upon furlough pay, if the reason for their retirement was not an incident of the service) applies to officers of the Marine Corps. (Rev. Stats. Sections 1454, 1593). Such, however, is not the case. For the Marine Corps different legislation is provided.

"In answer to the questions submitted by you, I have, therefore, the honor to reply that, in my opinion, Lieutenant Welles was retired in conformity with the law providing for the retirement of officers of the Marine Corps, and that he is entitled to receive 75 per centum of the pay of the rank upon which he was retired, *i. e.*, of the actual rank held by him at the date of retirement."

So in this case the retirement of the officer upon furlough pay was in manifest inadvertence of the provision of the Personnel Act which gives Army pay to officers of the Navy. The Navy now gets Army pay just as the Marine Corps has done ever since 1834. The only pay now fixed for officers in the Navy retired since the date of the Personnel Act is that fixed by Rev. Stat. § 1274 (*ante*, p. 4) for officers of the Army, that is, 75 per cent of the pay of the rank actually held by them at the date of retirement. To this pay the claimant is entitled.

Present Rule Incongruous.

The rule now enforced consists of an incongruous combination of the Army rate of pay provided by the Personnel Act, with the provisions of the old law for a half-pay rate to officers of the Navy on the retired list in certain cases.

It is impossible to apply § 1593 (*ante*, p. 7) to the new rates of Navy pay provided by the Personnel Act. There is no "leave of absence" pay under the Army pay table (§ 1261, *ante*, p. 4) as there was under the old Navy pay table (§ 1556, *ante*, p. 6). The difficulty is not removed by giving the officer (as is done) half the

pay to which he would be entitled (Personnel Act, § 13, proviso (1), *ante*, p. 7) "when on shore," for this is not what the law calls for. The Army law provides (§ 1265, *ante*, p. 4) several different rates of pay for officers absent from duty; but no one of these is applied by the practice shown by this case, or is capable of being applied.

These Army rates of pay for officers on leave of absence or waiting orders are entirely different from those fixed by the old Navy statute (Revised Statutes, Sec. 1556). They have always been regarded as in effect, as regards the Navy, since 1899.

The present Attorney-General, after quoting Sec. 13 of the Personnel Act, says (27 Opin. 261, 266):

"The leave pay and pay on waiting orders of officers of the army—to which the pay of most naval officers is thus assimilated—is thus regulated by section 1265, Revised Statutes, and provides:

"'Officers when absent on account of sickness or wounds, or lawfully absent from duty and waiting orders, shall receive full pay; when absent with leave, for other causes, full pay during such absence not exceeding in the aggregate thirty days in one year, and half pay during such absence exceeding thirty days in one year. When absent without leave, they shall forfeit all pay during such absence, unless the absence is excused as unavoidable.'"

Here several different rates of pay are provided for an officer absent on leave, not merely one rate, as was provided for the Navy by the old provision existing prior to 1899. Sections 1454 and 1593 of the Revised Statutes (*ante*, pp. 5, 6, 7) providing that officers placed on the retired list shall under some circumstances receive furlough pay defined as "one half of the pay to which they would have been entitled if on leave of absence on the active list," are not only therefore inconsistent with the provision made by the Personnel Act for Army pay for line officers of the Navy, but are absolutely incapable of

application to the pay to which such an officer "would have been entitled if on leave of absence on the active list."

See further as to application of § 1265 Rev. Stat. to officers of the Navy, *DeLancy's* case, 11 Comptroller's Decisions, 576; *Delehanty's* case, 6 Comp. Dec. 557.

The only solution of the problem is in a consistent adherence to the rule of Army pay, as required by the Personnel Act.

Decisions of this Court.

A number of cases have come before this court under the Personnel Act and in every one of them the decision is based upon the application of Army statutes to the pay of the Navy, as required by the Personnel Act. The cases most strikingly showing this analogy are *United States* v. *Crosley*, 196 U. S. 327; *United States* v. *Miller*, 208 U. S. 32; *United States* v. *Farenholt*, 206 U. S. 226.

Repeal of Shore Duty Reduction.

The claim asserted in this case extends to December 31, 1906. During the whole of that time, except for a short term of active duty in 1903 and 1904, he "has been paid at the rate of $1,071 a year" (Finding III, record, p. 3). The pay of the appellant as a lieutenant of more than twenty years' service in the Navy at the time of retirement corresponding to captain not mounted in the Army is $1,800 a year (Revised Statutes, Sec. 1261) with forty per cent longevity increase (Secs. 1262, 1263, *ante*, p. 4), amounting to $2,520. Under the original terms of Sec. 13 of the Personnel Act, proviso (1) (*ante*, p. 7), this was to be reduced by fifteen per cent "when on shore." This made $2,142, one-half of which sum is $1,071, the rate at which appellant has been paid.

Since June 29, 1906, however, there has been no reduc-

tion for shore duty, the proviso (1) to that effect (*ante*, p. 7) having been repealed on that date (34 Stat. L. 554).

If therefore the proper basis on which this officer is to be paid is one-half of what he would get if on shore duty on the active list, his proper rate of pay since June 29, 1906, is one-half of $2,520, not of $2,142. He would thus be entitled to $1,260 a year pay instead of $1,071 for the period from June 29, 1906, to December 31, 1906, to which date his claim goes down.

On no possible theory can any effect be given since June 29, 1906, to the fifteen per cent reduction which no longer existed after that date.

We have made a second or alternative assignment of error (*ante*, p. 10) for the failure to give the appellant the benefit of this repeal of the fifteen per cent reduction.

Conclusion.

The judgment of the Court of Claims should therefore be reversed and the case remanded to that court, with directions to award this officer the same pay which would be given to an officer of the Army retired under similar circumstances, to wit: seventy-five per centum of the pay of the rank upon which he is retired, less the amount of pay already received.

GEORGE A. KING,
Attorney for Appellant.

No. [illegible] 30.

In the Supreme Court of the United States.

OCTOBER TERM, 1911.

WILLIAM G. HAMILTON, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

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In the Supreme Court of the United States.

OCTOBER TERM, 1911.

WILLIAM G. HANNUM, APPELLANT,
v.
THE UNITED STATES.
No. 249

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

I.

STATEMENT.

The appellant entered the naval service of the United States in 1872, and prior to the year 1900 attained the rank of lieutenant on the active list of the Navy of more than twenty years' service.

On October 22, 1900, upon the report of a retiring board that he was incapacitated for active service and that such incapacity was not the result of any incident of the service, the appellant was placed on the retired list of the Navy by the following order of the President:

> EXECUTIVE MANSION,
> *October 22, 1900.*
>
> The proceedings and findings of the board in this case are approved, and Lieut. William

> G. Hannum, U. S. Navy, will be retired from active service and placed on the retired list on furlough pay, in conformity with the provisions of section 1454 of the Revised Statutes.
>
> WILLIAM MCKINLEY.

(Findings I and II, Rec., p. 3.)

It is provided by Revised Statutes, section 1593:

> Officers placed on the retired list on furlough pay shall receive only one-half of the pay to which they would have been entitled if on leave of absence on the active list.

The pay of appellant at the time of his retirement as a lieutenant of more than twenty years' service in the Navy, under section 13 of the so-called Navy personnel act of March 3, 1899 (30 Stats., 1007), corresponded to that of a captain in the Army, not mounted, and was $1,800 a year (R. S., sec. 1262), with 40 per cent longevity increase (secs. 1262 and 1263), amounting to $2,520 a year, reduced by 15 per cent for duty on shore (sec. 13, act March 3, 1899, *supra*), making his total compensation on the active list when retired $2,142.

Since his retirement (except for a short term of active duty in 1903 and 1904, in no way material to this controversy) the appellant has been paid one-half of the last-named sum, or at the rate of $1,071 per year. (Findings III and IV, Rec., p. 3.)

On the 16th of October, 1906, or six years after his retirement, the appellant began this suit in the court below, contending that the method adopted for the computation of his pay on the retired list was erro-

neous, and that under the opening clause of section 13 of the personnel act providing that officers of the line of the Navy should receive the same pay and allowances as officers of corresponding rank in the Army, he was entitled to receive the same rate of pay on the retired list as an officer of corresponding rank and length of service in the Army, to wit, 75 per centum of the pay of the rank upon which retired (R. S., sec. 1274) less the amount already received, making a difference of $819 per year, or a total of $4,651.84 for the period claimed in the petition.

The Court of Claims held that the assimilating clause of section 13 applied only to officers on the active list of the Navy, and did not repeal or modify the prior law respecting the pay of that particular class of officers compulsorily retired for incapacity not resulting from any incident of the service, and dismissed the petition, whereupon the claimant appealed to this court.

II.

THE STATUTES.

Among the number entitled, "Statutes of possible application," set out in appellant's brief, pages 2 to 8, the following appear material to the issue in controversy:

THE NAVY.

Revised Statutes:

> SEC. 1454. When said board finds that an officer is incapacitated for active service and

that his incapacity is not the result of any incident of the service, such officer shall, if said decision is approved by the President, be retired from active service on furlough pay, or wholly retired from service with one year's pay, as the President may determine.

SEC. 1593. Officers placed on the retired list, on furlough pay, shall receive only one-half of the pay to which they would have been entitled if on leave of absence on the active list.

SEC. 1594. The President, by and with the advice and consent of the Senate, may transfer any officer on the retired list from the furlough to the retired pay list.

THE ARMY.

Revised Statutes:

SEC. 1252. When the board finds that an officer is incapacitated for active service, and that his incapacity is not the result of any incident of service, and its decision is approved by the President, the officer shall be retired from active service, or wholly retired from the service, as the President may determine. The names of officers wholly retired from the service shall be omitted from the Army Register.

SEC. 1274. Officers retired from active service shall receive seventy-five per centum of the pay of the rank upon which they are retired.

NAVY PERSONNEL ACT, MARCH 3, 1899
(30 STAT. L., 1004).

SEC. 13. That, after June 30th, 1899, commissioned officers of the line of the Navy and of the Medical and Pay Corps shall receive the same pay and allowances, except forage, as are or may be provided by or in pursuance of law, for the officers of corresponding rank in the Army:

Provided,[1] That such officers when on shore shall receive the allowances, but fifteen per centum less pay than when on sea duty; but this provision shall not apply to warrant officers commissioned under section twelve of this act:

* * * * *

And provided further, That nothing in this act shall operate to increase or reduce the pay of any officer now on the retired list of the Navy.

* * * * *

III.

ARGUMENT.

From the foregoing statutes it will be seen that while the procedure for the compulsory retirement of officers of both the Army and Navy for incapacity not resulting from incidents of the service are the same, there are material differences in the matter of pay to which officers in the two services are respectively entitled upon retirement. That is to say, an officer of the Army may be retired (1) on seventy-

[1] This proviso was repealed June 29, 1906 (34 Stats. 554).

five per centum of the pay of his rank, or (2) wholly retired from the service, as the President may determine; while an officer of the Navy can be retired only on (1) furlough or one-half of the pay to which he would have been entitled if on leave of absence, or (2) wholly retired from the service with one year's pay, as the President may determine, or (3) such officer may after retirement be transferred by the President, with the consent of the Senate, from the furlough to the retired pay list, where he would be entitled to receive one-half the sea pay of the rank held by him at the time of retirement. (R. S., sec. 1588; *Potts* v. *United States*, 125 U. S., 173; *United States* v. *Burchard*, Ib., 176.)

The appellant contends that section 13 of the personnel act necessarily abolished these differences, and that as the Army statute gives to Army officers retired from active service 75 per cent of the pay of the rank upon which retired, irrespective of the cause, the naval officer was thereafter clearly entitled under the assimilating clause of that section to Army retired pay when retired for any cause whatever. (Brief, p. 11.)

THE QUESTION INVOLVED.

Thus it will be seen that the single question presented by this case is whether the special provisions of the prior law contained in Revised Statutes, sections 1454, 1593, and 1594, are inconsistent with and therefore repealed by the general terms of section 13 of the Navy personnel act.

This court had occasion to consider a similar question in the case of *Rodgers* v. *United States* (185 U. S., 83), and to there reject a construction of section 13 of the personnel act identical in principle with that now contended for in the claim at bar.

In that case the claimant, a rear admiral of the line of the Navy, who under section 1466, Revised Statutes, ranked with a major general in the Army, brought suit in the Court of Claims to recover an alleged balance of pay to which he claimed to be entitled under the personnel act. By section 7 of that act it was provided that the active list of the line of the Navy should be composed of eighteen rear admirals, seventy captains, etc., and

> *Provided*, That each rear admiral embraced in the nine lower numbers of that grade [of which the claimant was one] shall receive the same pay and allowances as are now allowed a brigadier general in the Army.

And by—

> SEC. 13. That after June thirtieth, eighteen hundred and ninety-nine, commissioned officers of the line of the Navy and of the Medical and Pay Corps shall receive the same pay and allowances, except forage, as are or may be provided by or in pursuance of law for the officers of corresponding rank in the Army: *Provided*, That such officers when on shore shall receive the allowances but fifteen per centum less pay than when on sea duty.

The claimant contended first that the proviso in section 7 established a complete but temporary rule for the payment of the nine lower numbers in the grade of rear admirals and entitled them to the full pay given by the Army statute to a brigadier general without the 15 per cent reduction in pay for service on shore, and, second, that after the 30th of June, 1899, under and by virtue of the assimilating clause of section 13, all rear admirals became entitled to the pay and allowances of major generals in the Army, the proviso in section 7 with respect to the nine lower numbers being merely temporary and expiring on that day.

In overruling both of these contentions Mr. Justice Brewer, speaking for the court, said, pp. 87–89:

> It is a canon of statutory construction that a later statute, general in its terms and not expressly repealing a prior special statute, will ordinarily not affect the special provisions of such earlier statute. In other words, where there are two statutes, the earlier special and the later general—the terms of the general broad enough to include the matter provided for in the special—the fact that the one is special and the other is general creates a presumption that the special is to be considered as remaining an exception to the general, and the general will not be understood as repealing the special, unless a repeal is expressly named, or unless the provisions of the general are manifestly inconsistent with those of the special.
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> * * * * *

> In the light of this canon, how should these two sections be construed? Section 7 in effect abolishes the rank of commodore, at least so far as respects the active list of the line of the Navy, and lifts those in that rank to that of rear admiral. The attention of Congress was thus directed to such change, and the proper accompanying provisions in respect to salary and otherwise, and it declared that the lower nine rear admirals, they who were by the section lifted to that rank, should receive a particular salary. Clearly that was a special provision in respect to a matter to which the attention of Congress was at the time directed. If another statute had been passed at a subsequent or on the same day making general provision for the salaries of naval officers, clearly the canon to which we have referred would apply. *A fortiori*, when the subsequent general provision is in the same statute it should be held applicable. So, when in section 13, Congress prescribed a general rule for the salaries of naval officers, such general rule can not within the scope of this canon be understood as repealing the special provision in the prior section, but the special provision must be taken as an exception to and limitation of the general rule.

The same principle was applied by the Court of Claims in the case of *Elmer* v. *United States* (45 Court of Claims, 90), wherein it was held that a surgeon in the Navy dropped from the service for failure to pass his professional examinations for promotion was not entitled, by virtue of the assimilating clause of

the 13th section of the personnel act, to the one year's pay allowed by the Army statute to Army officers in similar cases.

So also in the case *Denig* v. *United States* (37 C. Cls., 383) it was held that a prior law authorizing the appointment of and providing higher annual pay for fleet engineers was not repealed by the personnel act, notwithstanding the provision of section 1 of the latter act, which in effect abolished the Engineer Corps of the Navy and transferred the officers thereof to the line of the Navy.

This court in *Petri* v. *Creelman Lumber Co.* (199 U. S., 487) had occasion to reaffirm the principle announced in the earlier case of *Rodgers* v. *United States, supra.*

There, by separate act, the State of Illinois was divided into certain Federal judicial divisions or districts, and the division in the northern district prescribed wherein certain suits should be brought, it being provided, however, that if two or more defendants resided in different divisions or districts the suit might be brought "in either in which either of the defendants may reside." The general judiciary act approved on the following day, March 3, 1887 (24 Stat., 552), declared that no suit should thereafter be brought "in any other district than that whereof the defendant was an inhabitant," and repealed all laws and parts of laws in conflict therewith.

The defendants successfully challenged the jurisdiction of the trial court upon the ground that being residents of the southern district they could not be

sued in the northern district of the State, claiming that the provision of the special act had been repealed by the general terms of the later act. This court reversed the judgment of the trial court, however, and in an opinion by the present Chief Justice said (199 U. S., 497):

> It is elementary that repeals by implication are not favored, and that a repeal will not be implied, unless there be an irreconcilable conflict between the two statutes. And especially does this rule apply where the prior law is a special act relating to a particular case or subject and the subsequent law is general in its operation.
>
> To hold, then, that the general terms of the act of 1887 repealed the special and particular provisions of the act of 1887, relating to the districts in Illinois, we must conclude that there was such conflict between the two that it can not reasonably be inferred that Congress intended that the two should coexist.

Since it is manifest in the case at bar that the prior law embodied in Revised Statutes, sections 1454, 1593, and 1594, was special in character relating to a particular class of naval officers, namely, officers compulsorily retired for incapacity not incident to the service, it necessarily follows from an application of the principle of the above cases, to quote the language of Mr. Justice Brewer in *Rodgers* v. *United States*, *supra*, that "when in section 13 Congress prescribed a general rule for the salaries of naval officers, such general rule can not within the scope of this canon be

understood as repealing the special provision in the prior section, but the special provision must be taken as an exception to and limitation of the general rule."

It is, therefore, quite obvious that appellant's counsel is wholly wrong in his assertion (brief, p. 13) that the decision of the court below is "at war with the uniform current of decision in this court as well as the Court of Claims." Certainly the cases cited do not support that assertion nor can we perceive that they have any application whatever to the issue here involved.

RETIRED OFFICERS' PAY NOT ASSIMILATED.

Aside, however, from the conclusion which necessarily follows from the application of the well settled canon of statutory construction in respect to special and general statutes, the correctness of the decision below is also apparent from the language of the assimilating clause of the 13th section itself, in which, as will be observed, no reference is made to retired officers. Indeed the very phrase "pay *and* allowances" by which the increased compensation was authorized may well be said to necessarily exclude them, since no officer in either the Army or Navy receives any "allowances" whatever on the retired list.

Furthermore, the first proviso to that section (repealed some seven years later by the act of June 29, 1906; 34 Stats., 554) declares "That *such* officers" (that is to say, commissioned officers of the line and

of the Medical and Pay Corps), "when on shore shall receive the *allowances* but fifteen per centum less pay than when on sea duty," thus affording an additional indication that the increased compensation provided was intended to apply to officers on the active list alone.

The same may be said as to the second proviso and in fact a reading of the whole section clearly shows the intention of Congress to have been that only officers on the active list should receive the same pay and allowances as officers of corresponding rank in the Army.

PROVISIONS OF THE PERSONNEL ACT RELATING TO RETIRED PAY.

It is insisted, however, that the concluding proviso to section 13 of the personnel act, "That nothing in this act shall operate to increase or reduce the pay of any officers now on the retired list of the Navy," is a plain indication of congressional intent that officers retired afterwards should be paid according to the new pay table.

This contention, if conceded, lends no strength whatever to appellant's claim, for, as found by the court below, Lieutenant Hannum has been paid since retirement according to the new pay table; that is to say, one-half of the pay he would have received had he been on shore duty on the active list (Findings III and IV, Rec., p. 3), namely, pay corresponding to that of a captain in the Army, not mounted, with forty per cent longevity increase thereon, reduced by fifteen per cent for duty on shore, or a total compen-

sation on the active list of $2,142, one-half of which is $1,071.

But it is further argued that the pay an officer had been receiving prior to the date of his retirement on the active list is always taken as the starting point toward calculating his pay after retirement; that the annual pay being thus fixed by an Army statute the percentage fixed by that statute must necessarily be taken as the percentage to be given such officers as their pay after retirement; and, further, that "To hark back to the old pay statute in force before the passage of the personnel act to ascertain what percentage of his active pay the officer is to receive is an incongruity and contrary to the terms of the personnel act." (Brief, p. 15.)

SECTIONS 8, 9, AND 11 OF THE PERSONNEL ACT.

This argument, however, completely ignores the provisions of sections 8, 9, and 11 of the same act creating a new class of retired officers and prescribing a method by which a definite number should thereafter be annually retired.

Section 8 provides that officers of the line of the Navy in grades of captain, commander, and lieutenant commander, may by application first made to the Secretary of the Navy have their names placed on a list of "Applicants for voluntary retirement," and when at the end of any fiscal year the average number of vacancies for that year above and between the grades of commander and lieutenant (junior grade) have been less than a specified number, the President may in

the order of the rank of the applicants place a sufficient number on the retired list with the rank and three-fourths the sea pay of the next higher grade.

Section 9 provides, "That should it be found at the end of any fiscal year that the retirements pursuant to the provisions of law *now in force*, the voluntary retirements provided for in this act and casualties are not sufficient to cause the average vacancies enumerated in section 8 of this act," (our italics) the Secretary of the Navy shall appoint a board who shall "then select, as near as practicable after the first day of July, a sufficient number of officers from the above-mentioned grades as constituted on the thirtieth day of June of that year, to cause the average vacancies enumerated in section 8 of this act," who upon the approval of the President shall also be retired with the rank and three-fourths the sea pay of the next higher grade.

> SEC. 11. That any officer of the Navy, with a creditable record, who served during the Civil War, shall, when retired, be retired with the rank and three-fourths the sea pay of the next higher grade.

Thus it will be seen that the attention of Congress was directly drawn to the laws governing the retirement of officers of the Navy and that Congress in express terms reaffirmed "the provisions of law now in force" relating to that subject.

By those laws the pay of all officers retired for age or incapacity resulting from long and faithful service, or wounds or injuries received in the line of duty, or

from sickness and exposure therein, receive seventy-five per centum of the sea pay of their rank at the time of retirement, while all other officers on the retired list receive one-half the sea pay of the rank held by them at the time of retirement (R. S., section 1588), except officers retired on furlough pay for incapacity not of service origin, who receive only one-half the pay to which they would have been entitled if on leave of absence on the active list (sections 1454 and 1593).

Is it reasonable to suppose had Congress intended to reverse its long settled policy and to completely abolish these distinctions, thereby placing all officers on the retired list on an exact equality as to pay, no matter for what cause retired, that Congress would have failed to declare such purpose in clear and unmistakable language instead of leaving its intention to be determined from the general terms of section 13 of the personnel act?

To quote the language of the opinion in the court below:

> We must therefore conclude that had Congress intended by their legislation to increase the pay of officers of the Navy on the retired list who were retired because of their own misconduct, as provided by said section 1454, they would have said so; and as the last proviso to said act expressly excluded officers on the retired list at the time the act was passed from the operation thereof, we can see no reason why officers retired since the passage of the act by reason of their own misconduct, as

in the case at bar, should not receive the pay provided for by section 1593, and especially as such has been the ruling of the executive departments having to do with such retirements since the act was passed (Rec., p. 5).

CONSTRUCTION OF LAW BY NAVY DEPARTMENT.

The accuracy of this latter statement of the court below respecting the ruling of the executive departments is challenged and certain "remarks" attached to "Navy and Marine Corps pay tables" are quoted to support counsel's assertion that since the passage of the personnel act "officers of the line and of the Medical and Pay Corps receive 75 per cent of the pay of their rank in all cases irrespective of the cause of retirement." (Brief, pp. 15 and 16.)

This assertion is wholly erroneous, as appears from the Official Register of the Navy for 1911 (page 180), which shows during the years covered by this claim (1900 to 1906), that in addition to the claimant, the following officers were "Retired for incompetency or disability proceeding from other causes not incident to the service, in conformity with section 1454 R. S.:"

One ensign (an officer of the line).
One assistant surgeon.
One chaplain.
One chief gunner (ranking with but after ensign)
and
One boatswain.

Counsel's assertion, moreover, is wholly misleading. It is true that officers of the line, Medical and Pay Corps, retired subsequent to the passage of the personnel act, received seventy-five per centum of pay

(salary and increase) of their rank, but this was not because of the fact that their pay on the retired list was assimilated to that of Army retired pay. It was simply because the officers referred to were retired under the provisions of the Navy law, for causes specified in paragraph 1, section 1588, Revised Statutes, which fixed their pay at seventy-five per centum of the pay of the rank held by them, respectively, at the time of their retirement. Such officers, when retired under paragraph 2 of the same section, or under section 1454, like all other officers of the Navy, as shown by the Navy Register, above quoted, were entitled only to one-half pay.

The officers referred to in Table 3 are officers of the Navy other than those of the line, Medical and Pay Corps; that is to say, officers of the Construction and Civil Engineer Corps, chaplains, and professors of mathematics, whose pay was not affected by the personnel act and who, therefore, continued to be paid at old Navy rates on the active list but who when retired received, under section 1588, three-fourths or one-half the sea pay (at old Navy rates) of the grade or rank which they held, respectively, at the time of their retirement according to the way in which retired.

Thus it will be seen that the cause of the distinction between the two classes of officers named in the pay tables referred to was due entirely to the fact that they received two different rates of pay on the active list and was not due to any assimilation of Navy retired pay to Army retired pay. In other words, the

rates of pay for all officers of the Navy on the retired list was governed by the same laws according to the manner in which each was respectively retired.

CONSTRUCTION OF LAW BY TREASURY DEPARTMENT.

It is true that in several decisions rendered shortly after the passage of the personnel act the Comptroller of the Treasury held that under the personnel act time on the retired list was to be counted in computing the pay of retired officers of the Navy. These decisions were, however, in effect overruled by the Court of Claims in the case of *Faust* v. *United States* (42 C. Cls., 94) and also by the comptroller in Eleventh Comptroller's Decisions, 419.

RETIREMENTS IN MARINE CORPS NOT ANALOGOUS.

Much emphasis is laid upon an opinion of the Attorney General rendered in 1878 concerning the rate of pay to which an officer of the Marine Corps, retired for incapacity not an incident of the service, was entitled, which it is claimed presented a question analagous to the one at bar.

In that case, however, as stated in the opinion, the retirement of officers of the Marine Corps was governed by sections 1622 and 1623 of the Revised Statutes, the first of which required officers of that corps to be retired in all cases and in the same manner and "with the same relative conditions in all respects" as officers of the Army are retired, except as otherwise provided by the latter section.

In view of the fact that there was but one rate of pay established by law for officers of the Army

retired under similar circumstances, namely, seventy-five per centum of the pay of the rank upon which retired (sec. 1274) and it appearing from a review of the facts involved that it was not the intention of the President to retire that officer wholly from the service, the Attorney General very properly held that Lieut. Wells was entitled to the pay established by law for retired officers of the Marine Corps notwithstanding a different rate of pay had been inadvertently named in the order by which he was retired. In the case at bar there is no basis for the assertion that a similar inadvertence exists, for here, as we have seen, the retirement of the officer was in strict conformity with the explicit provisions of the statute.

PRESENT RULE NOT INCONGRUOUS.

The final objection urged against the judgment below rests upon the assertion that it is impossible to apply section 1593, Revised Statutes, to the new rates of Navy pay provided by the personnel act because there is no "leave of absence" under the Army pay table (sec. 1261) as there was under the old Navy pay table (brief, p. 20). It is true that the effect of section 13 of that act was to abolish the old rate of leave or waiting-orders pay provided by the old Navy law (sec. 1556) for officers of the line and to that extent, therefore, this latter assertion may be said to be correct. But section 1593 does not direct nor require that officers placed on furlough shall receive one-half of "leave of absence" pay, provided

by the old Navy law, but expressly declares that they "shall receive only one-half of the pay to which *they would have been entitled if on leave of absence on the active list.*"

Now what was that pay? Turning to section 13 of the personnel act we find that for officers of the line on active duty it is the same pay as provided for officers of corresponding rank in the Army except that such officers *when on shore* shall receive the allowances, but fifteen per centum less pay than when on sea duty. It is, therefore, quite obvious that this latter sum (prior to the act of June 29, 1906, repealing the fifteen per cent reduction clause, 34 Stats., 554) was the pay to which an officer would have been entitled if on "leave of absence on the active list." And it is one-half of that sum which the appellant has received since the date of his retirement.

Not only is there no incongruity in the rule thus adopted for the computation of appellant's pay in this case but it conforms to the provisions of law relating to leaves of absence of officers of the Army as contained in Revised Statutes:

> Sec. 1265. Officers when absent on account of sickness or wounds, or lawfully absent from duty and waiting orders, shall receive full pay; when absent with leave, for other causes, full pay during such absence not exceeding in the aggregate thirty days in one year, and half pay during such absence exceeding thirty days in one year. When absent without leave they shall forfeit all pay during such absence, unless the absence is excused as unavoidable.

REPEAL OF SHORE DUTY REDUCTION.

The statement of counsel is correct that the appellant has not received the benefit of the repeal by act of June 29, 1906 (34 Stat., 554), of the proviso of section 13 of the personnel act, "That such officers when on shore shall receive the allowances but fifteen per centum less pay than when on sea duty."

The benefit of this repeal was not claimed in the petition nor does the record show that it was brought in any manner to the attention of the court below. It is obvious, however, that can not be allowed under any circumstances in view of the explicit provisions of the act of August 5, 1882 (1 Supp. R. S., 377), declaring that—

> Hereafter there shall be no promotion or increase of pay in the retired list of the Navy, but the rank and pay of officers on the retired list shall be the same as they are when such officers shall be retired.

CONCLUSION.

We submit that the judgment of the Court of Claims dismissing the petition in this case was correct and we ask that the judgment be affirmed.

JOHN Q. THOMPSON,
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Attorney.

HANNUM *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 30. Argued December 9, 1912.—Decided January 6, 1913.

The assimilating clause of § 13 of the Navy Personnel Act of 1899 applies only to officers on the active list and does not repeal the prior laws respecting the pay of officers compulsorily retired under § 1454, Rev. Stat., for incapacity not resulting from any incident of the service.

A statute will not be so construed under an assimilation clause as to destroy legislation which Congress incorporated into the act after having it called to its attention.

The Personnel Act emphasizes the plain intent of Congress not to destroy the then existing standards of retirement for Navy officers, but to retain and add to those standards as distinguished from the standards of retirement fixed for the Army.

43 Ct. Cl. 320, affirmed.

THE facts are stated in the opinion.

Mr. George A. King for appellant.

Mr. Frederick DeC. Faust, with whom *Mr. Assistant Attorney General John Q. Thompson* was on the brief, for the United States.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

By an order dated October 22, 1900, the President approved the finding of a retiring board and directed that "Lieut. William G. Hannum, U. S. Navy . . . be retired from active service and placed on the retired list on furlough pay, in conformity with the provisions of section 1454 of the Revised Statutes." Thereafter Lieu-

tenant Hannum was paid the compensation fixed by § 1593 of the Revised Statutes, viz: "One half of the pay to which they" (officers placed on the retired list on furlough pay), "would have been entitled if on leave of absence on the active list."

Upon the contention that in virtue of the opening clause of § 13 of the Personnel Act of March 3, 1899, 30 Stat. 1004, 1007, c. 413, providing that officers of the line of the Navy shall receive the same pay and allowances as officers of corresponding rank in the Army, this action was brought to recover the difference between the sums actually paid to Lieutenant Hannum and the pay fixed by Rev. Stat., § 1274, of an officer of corresponding rank in the Army when placed on the retired list, viz. 75 per cent. of the pay of the rank upon which retired.

The Court of Claims held that the assimilating clause of § 13 of the Personnel Act applied only to officers on the active list of the Navy, and did not repeal the prior law respecting the pay of that particular class of officers compulsorily retired under § 1454, Revised Statutes, for incapacity not resulting from any incident of the service. In other words, the court decided that growing out of the differences between the distinct classifications made for the retirement of Navy officers and the pay allowed to such retired officers depending upon the causes for retirement and the differences in this respect existing between statutory regulations as to the retirement of Army officers, that the provision of the Personnel Act had not repealed the specific provisions as to the retirement of Navy officers and the retired pay to which such officers were entitled. Applying the construction which it thus gave to the statute the court denied the relief claimed, except for the sum of $31.42, balance of pay due for a short period of active service after retirement, and the Government has acquiesced in such allowance. 43 Ct. Cl. 320.

We think the court was right in the view which it took

of the so-called Personnel Act. The provisions of §§ 8, 9 and 11 of the act not only created a new class of retired officers of the Navy, but § 9 contains an express reference to "the provisions of law now in force," relating to retirements in the Navy. As said by counsel for the Government:

"By those laws the pay of all officers retired for age or incapacity resulting from long and faithful service, or wounds or injuries received in the line of duty, or from sickness and exposure therein, receive seventy-five per centum of the sea pay of their rank at the time of retirement, while all other officers on the retired list receive one-half the sea pay of the rank held by them at the time of retirement (Rev. Stat., § 1588), except officers retired on furlough pay for incapacity not of service origin, who receive only one-half the pay to which they would have been entitled if on leave of absence on the active list (sections 1454 and 1593)."

It thus being plain that the attention of Congress when it adopted the Personnel Act was specially drawn to the existing statutory regulations relating to the retirement of Naval officers and to the causes for which retirement should be allowed, and the amount of the retired pay of such officers and that provision was made as to these subjects varying radically from the system of Army retirement by providing different proportions of pay for different causes of Navy retirement, it is not open in reason to hold that Congress intended by the provision in question of the Personnel Act to destroy the legislation which it sedulously incorporated and made a part of that act. In other words, as the Personnel Act itself emphasizes the plain intention of Congress not only not to destroy the standards of retirement fixed for Navy officers, but on the contrary to retain and add to those standards, as distinguished from the standards of retirement fixed for the Army, we think the claim here made was properly dis-

allowed. Nothing could more aptly illustrate the necessity for this conclusion than by directing attention to the result which would inevitably follow from taking another view. Thus it may not be doubted that the express object of the Personnel Act was to give a right of retirement for long and distinguished services, for wounds contracted in the course of the service as distinguished from the ordinary right to retire. And yet if the construction of the statute now urged were to be upheld it would follow that an assimilation was made by the Personnel Act not only between the pay of officers on the active list of the Navy and those of the Army, but also between officers of the Navy themselves by putting on a parity as to retirement and retired pay all officers of the Navy, irrespective of the meritorious or non-meritorious character of their services and despite the clear distinction in that regard expressly provided for by the terms of the Personnel Act.

Affirmed.